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No. 90-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROTHERHOOD OF RAILWAY CARMEN
(Division Of TCU), *et al.*,

Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Was the Fifth Circuit correct in affirming the district court's judgment that the Petitioner-Unions' claim of unlawful direct dealing in violation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), involved a minor dispute within the exclusive jurisdiction of the RLA arbitration board?

LIST OF PARTIES

The parties are properly identified in the caption and in footnote 1 of Petitioner-Unions' brief.

RULE 29.1 LISTING

Pursuant to Supreme Court Rule 29.1, Respondent's parent companies are Santa Fe Industries, Inc. and Santa Fe Pacific Corporation. In addition, Respondent jointly owns the following subsidiaries: Alameda Belt Line, Central California Traction Company, The Oakland Terminal Railway, St. Joseph Terminal Railroad Company, and Sunset Railway Company.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), respectfully submits that this case does not present any issue worthy of review by this Court and that the petition for a writ of certiorari should be denied.

The dispute between the parties turns on conflicting interpretations of a collective bargaining agreement, including the parties' past practices and the common law of the shop and the railroad industry. The issue presented to the Court is which tribunal—a court or an expert arbitration board—has jurisdiction to determine whether Santa Fe's voluntary resignation

program, whereby employees are merely given the option of resigning in exchange for a lump sum payment, is authorized by the parties' collective agreement.

In deciding that jurisdiction lies with the arbitration board and not the courts, the Fifth Circuit Court of Appeals correctly applied well-settled law regarding disputes between carriers and unions subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"). The Fifth Circuit recognized that if Santa Fe is correct in its interpretation of the collective agreement—*i.e.*, that the agreement, as established by past practice, authorizes Santa Fe's actions—then Santa Fe did not deal directly with its employees in violation of the RLA, but rather acted in conformity with the agreement. Although the Petitioner-Unions ("Unions") disagree with Santa Fe's contract interpretation, substantial precedent from this Court, the lower courts and even boards of arbitration supports the Fifth Circuit's ruling, based on the "minor dispute" principles of the RLA. Indeed, the Fifth Circuit's decision does not conflict with any other circuit court decision, and, in fact, it is entirely consistent with Supreme Court precedent and the two other appellate decisions that have addressed this issue.

Furthermore, this case turns on unique facts, such as the meaning of the past practices and course of dealing between Santa Fe and the Unions under their collective bargaining agreement. The case law reflects that RLA disputes over voluntary resignation programs are best suited for a case-by-case resolution. Accordingly, the Fifth Circuit's decision has no significance or policy import beyond the particular facts and parties in this case.

STATEMENT OF THE CASE

A. Statement of Facts.

Santa Fe is an interstate carrier subject to the RLA; the Unions are the exclusive bargaining representatives of Santa Fe's shop craft employees. Pet. 1a.[1] Santa Fe and the Unions are each signatory to the 1964 Shop Crafts Agreement ("Agreement"), which provides protective benefits for employees who are involuntarily deprived of employment or placed in a worse position as a result of certain operational changes, including "transfers of work." Pet. 5a-6a. The Agreement (art. I § 3) recognizes that employees may resign and denies protective benefits to an employee upon "his resignation." Pet. 12a n.11. In accordance with the RLA, article VI § 1 of the Agreement creates a Shop Craft Special Board of Adjustment with exclusive authority to resolve disputes arising under the Agreement.[2]

During the last four months of 1987, Santa Fe furloughed a number of shop craft employees at its Cleburne, Texas facility. Pet. 2a. On December 21, 1987, Santa Fe posted a notice at its Cleburne facility, offering certain shop craft employees, including those on furlough, an opportunity to resign voluntarily in

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[1] The Fifth Circuit's opinion is reported at 894 F.2d 1463. It is reproduced as Appendix A to the Petition for a Writ of Certiorari. References in this brief to the Fifth Circuit's decision are cited to the pages in Appendix A.

[2] Even if the Agreement did not provide for arbitration, the parties would be required to arbitrate any disputes under the Agreement in accordance with the mandatory arbitration provisions of the RLA. *See Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 323 (1972).

return for $20,000.00. *Id.* Over 200 Cleburne employees accepted the offer. *Id.*

B. Course of Proceedings.

On January 12, 1988, six of Santa Fe's shop craft unions filed suit in federal district court, seeking a declaratory judgment and injunctive relief over Santa Fe's voluntary resignation program. Pet. 2a. In the one cause of action pursued on appeal, the Unions contended that in offering the resignation program, Santa Fe violated RLA §§ 2 First, Second, Third, Fourth, and Ninth (45 U.S.C. §§ 152 First, Second, Third, Fourth, Ninth) by dealing directly with its Cleburne shop employees rather than through their designated representatives.[3] Pet. 2a.

In the district court, Santa Fe presented evidence of an established past practice of offering shop craft employees compensation in return for their voluntary resignations, without the express prior approval of the Unions. Pet. 12a-13a & n.12. This evidence included previous voluntary resignation offerings in January of 1984 and in January, May and August of 1987, as well as compensated resignations worked out with employees on an individual basis. Pet. 12a & n.12.

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[3] The Unions asserted two additional causes of action in the district court: (1) that Santa Fe violated the Agreement by allegedly transferring work from its Cleburne shop to shops in other states and by offering employees the voluntary resignation program and (2) that Santa Fe's resignation program constituted a unilateral change in the rates of pay, rules, and working conditions of the Cleburne shop employees, and thus violated RLA §§ 2 Seventh and 6 (45 U.S.C. §§ 152 Seventh, 156). The Unions did not appeal the judgment in Santa Fe's favor on these causes of action.

On October 26, 1988, the district court dismissed the Unions' complaint for lack of jurisdiction because the parties' disagreement constituted a minor dispute subject to mandatory arbitration under the RLA. Pet. 2a. The court looked to past practice evidence of voluntary, compensated resignations and concluded that Santa Fe's claim that the voluntary resignation program was consistent with a mutually understood course of dealing between the parties was nonfrivolous; thus the dispute was minor and within the exclusive jurisdiction of the arbitration board. Pet. 2a, 12a-13a.

On February 28, 1990, the Fifth Circuit affirmed the district court's judgment. The court held that Santa Fe's claims that the voluntary resignation program was contractually authorized by the parties' past practices has an arguable basis sufficient to render this a minor dispute subject to mandatory arbitration under the RLA. Pet. 12a-13a. The Unions' assertion that they could not have contractually permitted the resignation program because they are not authorized to waive the statutory right against direct dealing was rejected by the Fifth Circuit as being contrary to a body of case law that permits unions to waive statutory rights under the RLA. Pet. 5a n.5.

The Fifth Circuit also rejected the Unions' argument that the dispute in this case is neither a major nor a minor dispute, but a direct statutory violation of the RLA's direct dealing prohibition. Pet. 8a-9a. The court recognized that if Santa Fe is correct that the voluntary resignation program is permitted under its collective agreement with the Unions, then there has been no violation of the RLA. *Id.* Thus, resolution of the dispute turns on interpretation of the collective

agreement between the parties, which constitutes a minor dispute. *Id.*

Finally, the court rejected the Unions' argument that where an alleged contractual provision involves waiver of a statutory right, a higher level of scrutiny, *i.e.*, "clear and explicit" rather than "arguable," should be applied in determining whether a dispute is minor. Pet. 10a. The court relied on *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), in which this Court rejected a similar suggestion. Pet. 10a-11a. The Fifth Circuit noted that the "clear and explicit" waiver test urged by the Unions is a test for determining actual substantive contractual questions under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA"), and not a test for determining the preliminary question of what body has jurisdiction to address the underlying contractual dispute under the RLA. Pet. 11a n.9.

REASONS FOR DENYING THE WRIT

The Unions' articulated reasons for seeking certiorari do not fit within any of the recognized grounds for invocation of this Court's discretionary jurisdiction. The Fifth Circuit applied settled case law to the facts of this case and properly held that this case presents a minor dispute subject to mandatory arbitration under the RLA and the parties' collective agreement. Its decision does not conflict with any other court of appeals' decision, nor with any decision of this Court. Moreover, it turns on facts which are unique and, as reflected in the case law, are best suited for case-by-case resolution. Since this case was properly decided and does not fit any of the accepted

standards for granting Supreme Court review, the petition for certiorari should be denied.

I. THE FIFTH CIRCUIT'S DECISION IS IN CONFORMITY WITH WELL-ESTABLISHED SUPREME COURT PRECEDENT.

The gist of the Unions' argument is that the Fifth Circuit erred in holding that the district court did not have jurisdiction over their direct dealing cause of action because that claim alleged a violation of the RLA. As shown below, the Unions' direct dealing claim is merely a component part of the overall dispute between the parties regarding Santa Fe's voluntary resignation program and the propriety of that program under the collective agreement. As such, the entire matter, including the direct dealing claim, constitutes an arbitrable minor dispute.

A. The Fifth Circuit Correctly Held That This Case Involves a Minor Dispute Under the Railway Labor Act.

The Fifth Circuit recognized that the RLA provides two distinct procedures to promote the orderly resolution of labor disputes in the railroad industry. Pet. 7a-8a. In the case of a so-called "major dispute"—relating to disputes over the formation of collective agreements or efforts to secure them—before resorting to self-help, the parties are required to submit to conference and, if necessary, mediation in an effort to reach agreement over the matter in controversy. 45 U.S.C. §§ 152, 154-56. *See Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-25 (1945). Where, however, the dispute is classified as "minor"—relating to the meaning or proper application of a particular contract provision with reference to a specific situation or an omitted case—if not settled informally, it is subject

exclusively to resolution through arbitration. 45 U.S.C. § 153. *See, e.g., Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 322 (1972); *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 244-45 (1950); *Burley*, 325 U.S. at 723-25.

The Supreme Court recently placed its imprimatur on the standard applied by the lower courts in distinguishing between major and minor disputes when it held that

> [w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2482 (1989). *See also Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1521-22 (D.C. Cir. 1989); *St. Louis S.W. Ry. v. UTU*, 646 F.2d 230, 232-33 (5th Cir. 1981). The lower federal courts have refined the controlling test to the point that "if there is any doubt that a dispute is major or minor, a court will construe the dispute to be minor." *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 704 (7th Cir. 1987). *See also AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 650 (1986) (" '[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of

coverage.' ") (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

It is well-established that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers*, 363 U.S. at 581-82. *Accord Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1521-22 (D.C. Cir. 1989) ("The presumption in favor of arbitration is particularly strong because a collective bargaining agreement may include not only the terms of the written contract but also the 'common law of a particular industry or of a particular plant . . . .' ") (quoting *United Steelworkers*, 363 U.S. at 579); *Brotherhood of Locomotive Firemen & Enginemen v. Southern Pac. Co.*, 447 F.2d 1127, 1136 (5th Cir. 1971) (questions which turn on "custom and practice . . . are the grist for the decisional mill of the [RLA arbitration boards] created by Congress with primary jurisdiction over such matters").

In the instant case, the Fifth Circuit found that Santa Fe's evidence of past practice created a non-frivolous claim that the resignation program was arguably justified by past practice. Pet. 12a-13a. The court's ruling was supported by substantial evidence of past practice, including previous resignation offerings to craft employees and individually negotiated resignation agreements. Pet. 12a & n.12. The court thus properly held that the dispute presented was minor and subject to the exclusive jurisdiction of the arbitration board.[4] Pet. 8a-9a, 13a.

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[4] The correctness of the court's holding is underscored by the

In an attempt to avoid federal policy mandating arbitration, the Unions (Pet. 8, 14.) argue that the Fifth Circuit erred in holding that the district court had no jurisdiction over their direct dealing claim since they alleged an RLA violation. As they alleged in the court below, the Unions apparently contend that an arbitration board has no jurisdiction over this dispute. The Unions' argument is directly contrary to this Court's decision in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944).

In *Telegraphers*, the railroad unilaterally negotiated individual pay rates with certain employees. When the railroad contended that the individual agreements superseded the terms of the collective agreement, the resulting dispute was submitted to the National Railroad Adjustment Board. That Board issued "an award sustaining the claims that the agents were entitled to the compensation provided by the collectively bargained agreement" and also held "that the individual contracts were ineffective." *Id.* at 345. When the railroad did not comply with the arbitration award, the union sued to enforce the award in federal court. The railroad contended that the Adjustment Board lacked jurisdiction and was wrong on the merits. *See* decision below, *Railway Express Agency, Inc. v. Order of R.R. Telegraphers*, 137 F.2d 46, 49 (5th Cir. 1943). The Supreme Court held that the award "was in accord-

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fact that two of the Unions filed grievances contending that the alleged transfer of work from the Cleburne shop to shops in other states violated the Agreement in that Cleburne employees affected by the alleged transfer should be paid protective benefits under the Agreement. One of these grievances, filed by Petitioner Brotherhood of Railway Carmen, specifically complained of the voluntary resignation program challenged in this case.

ance with the law," 321 U.S. at 347, and thus recognized that RLA arbitration boards are competent to decide direct dealing issues.

Thus, strong federal policy and controlling Supreme Court precedent support the propriety of the Fifth Circuit's holding in this case. Significantly, adjustment board awards themselves demonstrate that claims of direct dealing in offering compensated resignation programs are grist for RLA arbitrators. *See* awards cited, *infra*, p. 16, n. 7.

B. The Fifth Circuit Correctly Decided the Claims Regarding Direct Dealing, Waiver and Stay of Proceedings.

The Unions' claims that Santa Fe engaged in statutorily prohibited direct dealing, that the Unions could not waive the employees' statutory rights against direct dealing or, alternatively that such a waiver must be "clear and unmistakable," and that the lower courts should not have dismissed their complaint, but rather should have stayed the proceedings pending arbitration, are without merit. First, contrary to the Unions' assertions, direct dealing over compensated voluntary resignations is permitted under the RLA, as shown by controlling Supreme Court precedent. Second, the Unions' contractual authorization allowing Santa Fe to offer its voluntary resignation program directly to employees does not constitute a waiver of the employees' statutory right to choose their bargaining representative, but is, at most, the relinquishment of the right to bargain over a particular economic subject matter—an action legally within the Unions' power. In addition, this Court has previously rejected a union's claim that a waiver must be "clear and unmistakable." Third, the Unions

did not timely raise, and thus waived, their argument that the court below should have stayed this action. In any event, under the RLA, a court has no jurisdiction over minor disputes, and dismissal, rather than a stay of proceedings, is proper.

1. The RLA Permits a Carrier To Deal Directly with Employees in Compensating Them for Their Voluntary Resignations.

The Unions argue (Pet. 9-14) that an employer cannot deal directly with its employees because such conduct is prohibited by the RLA and Supreme Court precedent. As a result, they assert that the dispute presented in this case is neither major nor minor, but, rather, involves a direct violation of the RLA because the voluntary resignation program constituted "direct dealing" in derogation of the employees' right to be represented exclusively by their chosen collective bargaining representatives. Only through this convoluted analysis are the Unions able to contend that their direct dealing claim can escape arbitration.

In support of their argument, the Unions cite several Supreme Court decisions regarding the right of employees to choose their own bargaining representative and to be exclusively represented by that entity in negotiations with a carrier. Pet. 9-14. Contrary to the Unions' assertions, however, these cases show that direct dealing of the type alleged in this case is permitted under the RLA.

Section 2 Ninth of the RLA (45 U.S.C. § 152 Ninth), provides that a carrier "treat with" its employees' certified bargaining representative. In *Virginian Ry. v. System Fed'n*, 300 U.S. 515 (1937), cited by the

Unions, the Court interpreted this provision as barring a railroad from negotiating with any other representative on a collective basis; however, the Court made clear that the RLA does not prohibit individual contracts that do not establish or change the rights or obligations of employees as a class:

> When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, *but not as precluding such individual contracts as petitioner may elect to make directly with individual employees.*

Id. at 549 (emphasis added).

In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), also cited by the Unions, the Supreme Court reaffirmed the *Virginian Ry.* holding in the context of the NLRA. The Court recognized that individual contracts which do not abolish or diminish an employer's obligations under a collective agreement, and which do not increase those of the employees, are permissible:

> *We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice.* But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.

Id. at 339 (emphasis added). The Court's specific focus on the employer's and employee's freedom to decide

individually whether to engage in the employment relationship, *id.* at 335, confirms the law's special tolerance for voluntary *resignation* agreements, which, rather than waiving a condition of employment while employment continues, merely sever the relationship altogether. Indeed, § 9 Eighth of the RLA (45 U.S.C. § 159 Eighth) specifically guarantees an employee's right to resign unilaterally.

The same day *J. I. Case* was decided, the Court issued its instructive opinion in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), and held that the RLA prohibits those contracts with individual employees that modify the obligations of the employer and employees already set forth in a collective agreement. *Id.* at 347. In *Telegraphers*, the Court sustained an NRAB award which found that individual agreements, which set a rate of pay for certain employees, were invalid because they established a rate of pay that was different from and completely inconsistent with the rate of pay specified in the collective agreement. 321 U.S. at 346-47.[5]

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[5] *See also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396 (1987) ("*J. I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective bargaining agreement."); *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 733-34, 736 (1945) ("It would be difficult to believe that Congress intended . . . to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation."); *Beeler v. Chicago, R.I.& P. Ry.*, 169 F.2d 557, 559 (10th Cir. 1948), *cert. denied*, 335 U.S. 903 (1949) (RLA "specifically recognizes the right of an individual employee to confer with management concerning matters of individual in-

In the instant case, the Unions cannot legitimately contend that the voluntary resignation program changes or undermines any collectively bargained rights or obligations. No language in any existing collective agreement restricts or conditions an employee's right to resign or Santa Fe's right to solicit a resignation. The only agreement even implicated in this case is the Shop Crafts Agreement, which indisputably contains no language prohibiting Santa Fe from offering money to employees in exchange for a *voluntary* resignation. Indeed, the Agreement (art. I, § 3) specifically denies to employees who voluntarily resign the benefits otherwise provided by the Agreement:

> An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation and rules governing working conditions in case of *his resignation* . . . . [emphasis added]

Thus, under the express terms of the Agreement, employees who resign do not fall within any class of even potentially protected employees, and they clearly have no right under the Agreement to any of the protective benefits. Santa Fe's resignation program accordingly does not undermine or change the terms of the Agreement.[6] In fact, the resignation program

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terest, and the bargaining representative is not authorized to bind the individual employees on matters outside the scope of the collective interest.").

[6] The Unions' reliance on *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), is also misplaced. In that case, which arose under the NLRA, the employer negotiated with a group of employees rather than the union for a wage increase. The union had not authorized the employer to deal directly with the em-

and alleged direct dealing with employees is supported by and consistent with the common law of the railroad industry as reflected in adjustment board awards.[7]

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ployees. As a result, the employer committed an unfair labor practice when it bypassed the union in negotiations. In contrast, in the instant case, Santa Fe did not bypass the Unions to deal directly with employees, but rather dealt with employees over their resignations pursuant to its claim of contractual authorization from the Unions, as reflected by the parties' agreement, including their past practices. In *Medo*, there was no claim that any contract authorized direct dealing, nor were questions of arbitral jurisdiction involved. *See also Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225, 1233 (1989) ("[T]he NLRA 'cannot be imported wholesale into the railway labor arena.' ").

[7] The RLA's expert arbitration boards have uniformly held that, absent an express labor agreement *prohibition*, the solicitation and consummation of voluntary resignations are entirely permissible. *See System Fed'n No. 69 v. Florida East Coast Ry.*, N.R.A.B. Award No. 4733, at 30 (2d Div. 1965) ("Nowhere in the Agreement or in the Railway Labor Act is there any prohibition forbidding employees from resigning their jobs; nor is there any requirement that resignations must take place with the concurrence of the labor organization. It is indisputable that an employee has an absolute right to resign from his job; it seems to be a logical extension of this concept to go further and conclude that an employee has the right to resign in exchange for a monetary consideration."); *System Fed'n No. 2 v. Missouri Pac. R.R.*, N.R.A.B. Award No. 1579, at 4 (2d Div. 1952) (Board held that under RLA and parties' agreement employee was free to terminate his employment relationship with carrier, with or without pecuniary consideration and was free to agree, for such consideration, never again to be employed by carrier; Board found nothing in parties' agreement or in RLA that prohibited making of contract between employee and carrier); *Burlington Northern, Inc. v. BRAC*, Spec. Bd. Adj. Award No. 16 (1975) (pursuant to Merger Agreement of Nov. 17, 1967)

2. The Fifth Circuit Properly Rejected the Unions' "Waiver" Arguments.

The Unions (Pet. 14-22) contend that dismissal of their direct dealing claim for lack of jurisdiction is inconsistent with decisions of this Court concerning waivers of statutory rights. They assert that the statutory prohibition against direct dealing cannot be waived by the employees' chosen bargaining representative because it is fundamental to the statute. Pet. 15. The Unions cite *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), for the proposition that " 'a union may bergain [sic] away its member's economic rights, but it may not surrender rights that impair the employees' choice of bargaining representative.' " Pet. 16.

Contrary to the Unions' belief, this labor relations truism actually supports the Fifth Circuit's decision. The Unions confuse the impairment of employees' choice of bargaining representative with a duly-designated bargaining representative's right to forego bargaining on a particular economic subject of bargaining. Santa Fe's argument and the Fifth Circuit's holding, that the Unions, through past practice, have contractually authorized Santa Fe to offer employees a voluntary resignation program, does not compromise the Union's representative status. Rather, this contractual authorization, even if denominated a waiver, was simply a relinquishment of the right to bargain over a particular economic subject matter, which *Magnavox* and *Metropolitan Edison* establish

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(Board, in effect, ruled that mere existence of contract provision permitting one type of employee separation allowance did not bar alternate voluntary resignation program).

was within the Unions' power to do. Significantly, in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944)—a case on which the Unions rely extensively—this Court expressly acknowledged that under the RLA a union can "agree[ ] that the company should be free to negotiate with [employees] severally." *Id.* at 347.[8]

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[8] The Unions' effort to create a conflict in the circuits on this issue by relying on *American Ry. & Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3615 (U.S. Mar. 27, 1990) (No. 89-1435), is farfetched and unavailing. In that case, the unions sought to require the railroad to bargain only through a national multi-carrier representative, despite the railroad's desire to designate its own representative to bargain over health and welfare issues on a local level. The Eighth Circuit held that the railroad had a statutory right to choose its own representative for bargaining and could not be forced to use the representative required by the union. In the instant case, the employees have designated the Unions as their bargaining representatives. Santa Fe has not attempted to force the employees to bargain through some other representative. Rather, the Unions, the representatives chosen by the employees, have through their past acquiescence given Santa Fe the right to deal directly with employees over resignation issues. If the Unions wish to change the terms of the collective agreement with Santa Fe, they are free to seek bargaining over the issue pursuant to RLA § 6 (45 U.S.C. § 156).

More destructive of the Unions' effort to create a conflict, however, is the fact that the Eighth Circuit, in *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989), specifically held that an employee resignation program, like the one considered by the Fifth Circuit in this case, was arguably permitted by the parties' collective bargaining agreement and thus gave rise to a minor dispute, notwithstanding the union's direct dealing claim. The Eighth Circuit thus is in complete agreement with the Fifth Circuit on the very issue presented in this case.

The Unions further contend that even if they could waive the employees' right to bargain over compensated resignations solely through their collective bargaining representative, such a waiver must be "clear and unmistakable," and not merely "arguable." Pet. 18-22. This argument was specifically rejected by this Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2483-84 (1989). The Unions' position, if accepted, would mean that disputes of this nature, where the carrier contends that the contract, past practices and common law of the industry authorize its conduct, would never proceed to arbitration because the court would be required to decide in the first instance whether the contract clearly and unmistakably authorized the carrier's conduct. If the court made that determination, there would be nothing left to arbitrate since the contract interpretation dispute would be decided by the district court. Such a rule would reverse the test for minor disputes and would be totally at odds with the strong policy of the RLA, which relegates matters of contract interpretation (whether they be based on past practices, the common law of the industry or the express terms of the contract) to arbitration. *See, e.g., BRAC v. Atchison, T. & S.F. Ry.*, 847 F.2d 403, 408 (7th Cir. 1988)("[W]hether [past practice] evidence is sufficient to establish an enforceable, contractual obligation is a question solely for the NRAB.").

Moreover, the Fifth Circuit correctly ruled that whether there has been a clear and unmistakable waiver of the right to negotiate over resignation issues is a question more properly addressed to the arbitration board and is not for the court to deter-

mine. Pet. 11a & n.9. The court's role is merely to determine whether there is an arguable basis for Santa Fe's position.[9]

The Unions assert (Pet. 21-22) that *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), considered controlling by the Fifth Circuit, does not apply to the instant case because that case involved a refusal to bargain, while this case allegedly involves direct dealing, and to apply *Consolidated Rail* to this case would be destructive of the statutory scheme.[10] In *Consolidated Rail*, the railroad asserted that a dispute over implementation of drug testing was minor because its past practice of conducting physical examinations of employees, in-

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[9] Santa Fe has never claimed that the Unions have waived the right to bargain over the resignation program. Rather, Santa Fe only asserts that the program is already permitted by contract, including the practices of the shop and industry. Even under the NLRA, from which the Unions purport to borrow their clear and unmistakable waiver theory, that test applies only when an employer contends that the union has contractually given up its statutory right to bargain over some issue. And even then, the NLRB will remit such disputes to arbitration. *E.g., Radioear Corp.*, 199 N.L.R.B. 1161 (1972); *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. 141, 142 (1969). The Unions here have never served a notice under RLA § 6 (45 U.S.C. § 156) to bargain over this subject, but instead seek to eliminate the program by judicial fiat.

[10] The Unions fail to explain why a refusal to bargain is less destructive of the statutory scheme than an employer's attempt to deal directly with employees. An employer's refusal to bargain could be more destructive of the statutory scheme since an employee has the right to refuse to deal directly with his employer and to refer all matters to his union if he so desires, whereas an employee would not be in a position to force his employer to bargain.

cluding drug testing under certain circumstances, arguably gave it the discretion to include drug testing in all physical examinations. The unions argued that it was a major dispute and that drug testing could not be implemented prior to the parties' bargaining over the issue. This Court held that where an employer asserts a contractual right to take a contested action, the dispute is a minor one subject to mandatory arbitration if the action is arguably justified by the terms of the collective agreement. *Id.* at 2482.

The Unions' efforts to distinguish *Consolidated Rail* are disingenuous. The instant case, like *Consolidated Rail*, involves the assertion by an employer, Santa Fe, of a contractual right to take a contested action, *i.e.*, to implement its voluntary resignation program. Thus, this case fits squarely within the *Consolidated Rail* holding.

3. The Fifth Circuit Properly Affirmed the District Court's Dismissal of the Case.

The Unions contend (Pet. 22-25) that even if the dispute in this case is arbitrable, the district court should not have dismissed the case, but rather should have stayed the proceedings during the pendency of the arbitration process. This argument was not raised in the district court and was not asserted on appeal until the Unions filed their reply brief and then only in a footnote. *See* Pet. 7 & n.4. The issue was not addressed by the Fifth Circuit. Under these circumstances, the Unions have waived their stay of proceedings argument. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Knighten v. Commissioner of Internal Revenue*, 702 F.2d 59, 60 n.1 (5th Cir.), *cert. denied*, 464 U.S. 897 (1983).

Even if the Unions had not waived their argument, their reliance on *Consolidated Rail, supra*, and *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946), is wholly unavailing. The Unions quote several passages from the Court's decision in *Consolidated Rail* which they claim support their stay argument: *e.g.*, the court must " '*defer* to arbitration' " when a carrier's claim of contractual authority to make a unilateral change in working conditions is arguably justified, and the effect of that ruling will be to " '*delay* collective bargaining in some cases' " and to " '*delay* [ ] the onset of [the Section 6] process until the Board determines on the merits that the employer's interpretation of the agreement is incorrect. . . .' " Pet. 22 (emphasis in petition). The Unions, however, fail to point out that in *Consolidated Rail* this Court reversed the Third Circuit which had held that the case involved a major dispute within the court's jurisdiction. This Court did not reverse and remand with instructions for the lower court to stay proceedings during the pendency of arbitration. Moreover, on remand the Third Circuit affirmed the order of the district court dismissing the complaint for lack of subject matter jurisdiction. *Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, 884 F.2d 1385 (1989).

The Unions' reliance on *Pitney* is similarly unpersuasive. In *Pitney*, the court had supervisory authority over the bankrupt railroad and thus had an independent basis for maintaining jurisdiction during the pendency of arbitration—the Bankruptcy Act. Moreover, *Pitney* was decided prior to the seminal decision in *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972), in which this Court recognized the arbitration boards' exclusive jurisdiction over all minor

disputes and emphasized that the courts are without jurisdiction when a minor dispute is in issue. *See also Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1979). Thus, the Fifth Circuit properly upheld dismissal of the case because the issue presented was a minor dispute over which courts have no jurisdiction.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND, IN FACT, THE CIRCUITS ARE UNIFORM IN THEIR RULINGS ON THIS ISSUE.

At least two other courts of appeals have held that disputes over a railroad's right to implement a resignation program must be arbitrated. In *BRAC v. Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988), the union contended that Santa Fe engaged in unlawful "direct dealing" by unilaterally offering employees a resignation program that was virtually indistinguishable from the one in this case. The district court dismissed BRAC's lawsuit based on evidence of past practice by Santa Fe of offering cash payments in exchange for resignations by BRAC-represented employees on two separate occasions.

The Seventh Circuit affirmed. The court found that "Santa Fe's past-practice evidence was sufficient to support a nonfrivolous claim that buyouts of clerical employees had become an established part of the parties' understanding of their contract." *Id.* at 406. Significantly, the court stated that "whether the [past practice] evidence is sufficient to establish an enforceable, contractual obligation is a question solely for the NRAB." *Id.* at 408.

The Seventh Circuit also held that it could not assert jurisdiction over BRAC's direct dealing claim. The court noted that the federal courts' "jurisdiction

over RLA violations is quite narrow" and that a court should not assert jurisdiction when contractual justification for the action is claimed, because to do so would intrude into the realm of RLA arbitration. *Id.* at 409.

In *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989), the Eighth Circuit held that Soo Line's resignation program raised an arbitrable minor dispute. Soo Line had acquired another railroad and entered into an employee protective agreement with the machinists' union. Thereafter, Soo Line decided to reduce the workforce and offered a voluntary resignation program whereby employees could resign for $15,000.00. *Id.* at 372. IAM sued to enjoin the program. The district court granted an injunction, but was reversed by the Eighth Circuit en banc.

The court considered whether IAM's lawsuit presented a major or minor dispute and held that "the conclusion is inescapable that the dispute is minor." *Id.* at 376. The court articulated the following controlling guidelines:

> In deciding whether a dispute is major or minor, it is not our function to interpret or construe the language of the collectively bargained-for agreements between the parties . . .; rather, our function is to determine whether this case implicates a question of contract interpretation. If the parties disagree whether the dispute can be resolved by reference to an agreement, the dispute is minor unless the claims of contractual justification are "frivolous" or "obviously insubstantial." . . . This rule is a necessary adjunct of

> the need to protect the arbitrator's exclusive jurisdiction over minor disputes and supports the additional corollary that "when in doubt, the courts construe disputes as minor." Thus, in this case, if the bargained-for agreements arguably permit the practice, then the Soo Line may proceed unilaterally, subject to arbitration before the National Railroad Adjustment Board.

Id. at 376-77 (citations omitted) (quoting *Brotherhood of Locomotive Eng'nrs v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 920 (7th Cir. 1985)).

In concluding that IAM's challenge to Soo Line's buyout program presented a minor dispute, the Eighth Circuit noted that "[a] number of tribunals have held that the very argument that the Soo Line sets forth here presents a minor dispute." *Id.* at 378. Relying on these cases, the court held that "[i]t is difficult to conceive how a legal position such as the Soo Line's, which has received such widespread judicial acceptance, could be 'frivolous' or 'obviously insubstantial.'" *Id.* at 380. *Accord Transportation-Communication Employees v. Grand Trunk W.R.R.*, 679 F. Supp. 696 (E.D. Mich. 1988); *IAM v. Illinois Cent. Gulf R.R.*, 120 L.R.R.M. (BNA) 2629 (S.D. Ill. 1984). *See also Chambers v. Burlington Northern, Inc.*, 692 F.2d 109, 112 (10th Cir. 1982) (question whether individual transfer agreement superseded right to allowances under merger protection agreement and collective agreement must be arbitrated); *Clausen v. Burlington Northern, Inc.*, 106 L.R.R.M. (BNA) 2496, 2498 (D. Mont. 1980) (controversy whether transfer agreement negotiated between individual employee and railroad violates RLA and merger protection agreement is arbitrable minor dispute).

III. THE FIFTH CIRCUIT'S REASONING WILL PROMOTE, NOT UNDERMINE, OPERATION OF THE RAILWAY LABOR ACT.

The Unions assert (Pet. 25-27) that the Fifth Circuit's decision that this case presents an arbitrable minor dispute will substantially undermine the operation of the RLA. They argue that Santa Fe's offer of the voluntary resignation program subverts the RLA's exclusive representation principle. The Unions, however, ignore the fact that this Court has recognized that a carrier may enter into individual contracts with its employees without violating the RLA. *See Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347 (1944); *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944); *Virginian Ry. v. System Fed'n*, 300 U.S. 515, 549 (1937). *See also* discussion, *supra*, at 12-16. In addition, they ignore the strong policy favoring arbitration of RLA disputes. *See Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93-94 (1979); *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972). *See also* discussion, *supra*, at 7-9. Finally, they ignore the fact that disputes over compensated resignations, such as the one in issue here, have consistently been deemed minor disputes within the exclusive jurisdiction of RLA arbitration boards. *See IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989); *BRAC v. Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988). *See also* adjustment board awards cited, *supra*, at 16 n. 7.

Significantly, the Court's decision in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944)—that the National Railroad Adjustment Board had jurisdiction to adjudicate and fashion

remedies in a dispute alleging direct dealing by the railroad with its employees—directly refutes the Unions' claim and supports the Fifth Circuit's reasoning that this dispute must be arbitrated, despite the Unions' assertion of an RLA violation. The *Telegraphers* decision provides proof positive that direct dealing disputes are proper subject matter for RLA arbitration, and it further underscores the fact that arbitration boards do have both the authority and the ability to decide such disputes and to fashion appropriate remedies. Based on the Supreme Court's decision in *Telegraphers* and the adjustment board awards discussed previously in this brief (*supra*, at 16 n. 7), it is clear beyond peradventure that the Unions' direct dealing claim can be arbitrated without upsetting the RLA statutory scheme. Indeed, arbitration would be in perfect harmony with that scheme. *See also Johns v. Baltimore & O.R.R.*, 118 F. Supp. 317, 320-21 (N.D. Ill.) (3-judge court), *aff'd*, 347 U.S. 964 (1954) (per curiam).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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